

# FAIR POLITICAL PRACTICES COMMISSION

## Memorandum

**To:** Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

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**Subject:** Pre-Notice Discussion of Amendments to the “Gift Cluster” Regulations 18946, 18946.1, 18946.2, and 18946.4; and adoption of Regulation 18640.

**Date:** October 25, 2004

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### I. EXECUTIVE SUMMARY

The Political Reform Act (the “Act”)<sup>1</sup> establishes a three-part statutory and regulatory scheme to reduce influences on public officials from the receipt of gifts. The first part prohibits the public official or candidate from accepting large gifts (\$340 or more) from anyone who may stand to benefit from the public official’s action and restricts any gift of \$10 or more from lobbyists and lobbying firms.<sup>2</sup> The second part requires the public official or candidate to disclose his or her receipt of any gift of \$50 or more from identified sources, so that the public is made aware of such gifts. The third part prohibits a public official from using his or her position to influence the outcome of a decision involving the donor of a gift valued at \$340 or more. This project involves three specific issues concerning the valuation of gifts.<sup>3</sup>

**Issue No. 1:** The first issue, raised as a result of recent advice requests relating to the Super Bowl activities in San Diego, involves determining the value of the benefit received by attending an event, and the regulatory amendments impact regulations 18946, 18946.1, and 18946.2.

Staff proposes amendments for the purpose of codifying a valuation rule for invitation-only events, including specifying the scope of benefits (such as entertainment and facilities usage) that must be considered in determining the valuation. The general rule for valuing such gifts has been the official’s or candidate’s pro rata share of the total cost of the event. Staff seeks the Commission’s guidance in codifying a valuation rule for such events and in determining what factors properly need to be considered in the

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<sup>1</sup>Government Code Sections 81000-91015. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> The making of gifts to candidates and public officials is also limited by the Act under specific circumstances.

<sup>3</sup> An interested persons’ meeting was held on May 26, 2004, regarding these issues.

gift's value. The amendments relating to this issue are set forth in Decision Points 1-6 below:

**Decision Point 1:** The amendment to regulation 18946 adds definitions for “face value,” “ticket/pass,” and “invitation.” These definitions are intended to provide clarification of the terms as they are used in the regulations and to distinguish between ticketed events and invitation-only events.

**Decision Point 2:** Currently, tickets are valued at “face value,” even when the donor pays a price higher than face value. The amendment to regulation 18946.1 would use “face value” as the value only when the ticket is purchased at face value or less. If the ticket is purchased at a price higher than face value, then the value of the ticket is the cost to the donor.

**Decision Point 3:** The amendment to regulation 18946.2 codifies the valuation rule regarding the value of the gift received in attending an invitation-only event — as the pro rata share of the cost of the event, and is the same rule as that currently applied in regulation 18946.2 for officials and candidates who are honored at a testimonial dinner.

**Decision Point 4:** The amendment to regulation 18946.2 codifies Commission advice as to the method of determining the “pro rata share of the cost of the event.”

**Decision Point 5:** The amendment to regulation 18946.2 creates an exception to the pro rata share of the cost of the event rule for officials who perform an official or ceremonial function at an invitation-only event. The value of attending such an event would be limited to the food and beverage provided to the official, in much the same manner as the value of tickets given to officials performing official or ceremonial functions at ticketed events are not gifts.

**Decision Point 6:** The amendment to regulation 18946.2 adds subdivision (e), modifying the pro rata share of the cost of the event rule for officials who attend an invitation-only event for a brief period of time. Referred to as a “drop-in visit,” the language codifies Commission staff advice, more prominent with respect to situations where officials attend lobbyist employer functions, but applied beyond that context in at least one advice letter. This amendment would apply this modified rule for all such functions, not just lobbyist employer-sponsored events.

**Issue No. 2:** Because, as indicated above, these events are sometimes hosted by lobbyist employers, a second issue developed regarding the concurrent reporting obligations of lobbyist employers under section 86112. Currently, a lobbyist employer may amend its activity expense report based upon information received from the attending official — that the official received less than his or her full pro rata value of the event. Accordingly, the amendments in Decision Point 7 set forth the procedures for reporting the value of attending an event on a drop-in basis with regard to the activity expenses incurred for a lobbyist employer event.

**Decision Point 7:** The amendment adds subdivision (f) to regulation 18946.2 and adds new regulation 18640, referring to the “drop-in” valuation modification as applied to lobbyist employer-sponsored events and the reporting obligations for both the official and the lobbyist employer. Proposed subdivision (f) states that the valuation rule is determined under new regulation 18640. Proposed new regulation 18640 states that the value shall be determined by the pro rata share of the cost of the event unless the official provides notification to the lobbyist employer that he or she attended on a “drop-in” basis. The lobbyist employer may amend its activity expense report based on this information, but is not required to.

**Issue No. 3:** The third issue, raised as a result of the Rose Bowl Parade and Rose Bowl Game, involves the “no value” rule for tickets to 501(c)(3) charitable fundraising events, and the regulatory amendments impact regulation 18946.4. Pursuant to this rule, staff has advised that tickets to the Rose Bowl Game and the Rose Parade have no value. Staff proposes that the Commission revisit regulation 18946.4 and consider amending it to narrow the exception for such events to exclude certain “big ticket” items, such as Rose Bowl tickets, or in the alternative, limit the number of tickets that may come under this exception and establish the value of anything over that limit at the face value of the ticket. The amendments relating to this issue are set forth in Decision Point 8 below.

**Decision Point 8:** The proposed amendments to regulation 18946.4 offer three options relating to the existing no value gift exception for 501(c)(3) organizations. The first option is to do away with the exception and make 501(c)(3) organizations fall under the same exception as any other nonprofit organization. The second option would limit the no value exception to two tickets only. The third option would limit the no value exception to events that are not commercially marketed.

## II. STATUTES AND REGULATIONS

Section 82028(a) provides that a “gift” means any payment<sup>4</sup> that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received.

As noted above, the Act regulates the making of gifts to public officials and candidates for elective office in several ways. First, it provides certain limitations regarding the total value of gifts that may be received by a candidate or public official from a single source and separately imposes a more restrictive gift limitation for lobbyists and lobbying firms. Second, it provides for public disclosure by candidates and officials of all gifts over a certain value from certain specified sources, and requires those engaged in lobbying activities to separately disclose the making of any gifts. Third, it mandates the disqualification of officials from participating in decisions that have an effect on the maker of any gifts over a certain value.

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<sup>4</sup> Section 82044 provides: “‘Payment’ means a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.”

A. Gift Limits: The Act imposes two restrictions limiting gifts made to public officials and candidates. Section 89503 provides a limit on the value of gifts received from any single source in any calendar year.<sup>5</sup> This restriction is applicable to all elected state and local officials and those officials enumerated in section 87200 (Section 89503(a)), all state, local, and judicial candidates for elective office (Section 89503(b)), and all members of a state board or commission or designated employees of a state or local agency if the member or employee would be required to report the receipt of the gift from that source on his or her statement of economic interest. (Section 89503(c).)

In addition to the general gift limitation provided in section 89503, the Act also imposes a restriction limiting the amount on any gifts made by lobbyists and lobbying firms. Section 86203 makes it unlawful for any lobbyist or lobbying firm to make, act as an agent or intermediary in the making of, or arrange for the making of any gift aggregating more than \$10 in any calendar month, directly or indirectly, to any state candidate, elected state officer, legislative official, or to any agency official of any agency listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist. (Sections 89501, 89503.)

B. Gift Reporting: The Act also imposes certain gift reporting obligations on public officials and candidates for elective office for gifts they receive totaling \$50 or more from a single source. (Section 87207.) Lobbyists, lobbying firms, and lobbyist employers are also required to report any gifts made to elected state officials, legislative officials, state candidates, agency officials or a member of the immediate family of any of these individuals. (Section 86111.) Lobbyists are additionally required to notify the beneficiary of those gifts. (Section 86112.5.)

C. Disqualification and Source of Gifts: The Act's conflict of interest provisions prohibit any state or local official from making, participating in the making, or in any way attempting to influence a governmental decision in which he or she has a financial interest. (Section 87100.) Financial interest includes any donor of a gift or gifts aggregating \$340 or more in value received by or promised to the public official within 12 months prior to the time the decision is made.

D. What is Not a Gift: The Act provides for certain exceptions to the definition of "gift" including: informational material, gifts that are not used and returned within 30 days of receipt, gifts from certain enumerated family members, campaign contributions, inheritance, and personal plaques and trophies valued under \$250. (Section 82028(b).) The Act also provides that certain gifts, while reportable, are not limited.<sup>6</sup>

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<sup>5</sup>The gift limit, currently \$340, is adjusted every two years to reflect changes in the Consumer Price Index.

<sup>6</sup>Travel payments reasonably related to a governmental purpose if made in connection with a speech, including lodging and subsistence on the day before, the day of, and the day immediately following the speech, travel provided by a governmental agency or bona fide public or private educational institution, and travel in connection with a bona fide business, trade, or profession that satisfies the federal income tax deduction criteria as a business expense are not prohibited. (Section 89506(a) and (b).)

Further examples of exceptions to the definition of “gift,” include: gifts of “[h]ospitality (including food, beverage, or occasional lodging) provided by an individual in his or her home when the individual or a member of the individual’s family is present;” presents exchanged between an official and an individual (other than a lobbyist) on holidays, birthdays, and similar occasions where the presents exchanged are not substantially disproportionate in value; leave credits donated under a catastrophic leave program established by the official’s employer; payments received for disaster relief assistance; admission and similar non-cash nominal benefits provided where the official gives a speech, participates in a panel or seminar or provides a similar service, including intrastate transportation, meals and necessary lodging (regulation 18942(a)); gifts to a government agency (regulations 18944.1 and 18944.2); and prizes or awards from a bona fide competition not related to an official’s status. (Regulation 18946.5.)

E. Valuation of Gifts: The valuation rules are found at regulations 18946-18946.5. Regulation 18946 sets forth the general rule for the valuation of gifts. Subdivision (a) provides that, unless otherwise provided in the exceptions contained in regulations 18946.1 through 18946.5, the general rule is that a gift is to be valued at its *fair market value*<sup>7</sup> as of the date of receipt or promise. Subdivision (b) provides that if the fair market value cannot be determined because the gift is unique or unusual, the value shall be the cost to the donor.

Regulation 18946.1 addresses the valuation of a gift of a ticket(s) to an event. This exception to the general rule provides that the value of the ticket is its face value *provided that the face value is the price that was, or otherwise would have been, offered to the general public.*

Regulation 18946.2 provides for valuation of gifts in attending a “testimonial dinner or similar event” where an “official or candidate is honored” and states that the gift value is the “official’s or candidate’s pro rata share of the cost of the event.”<sup>8</sup>

Regulation 18946.3 provides an exception in determining the value of wedding gifts, as a gift to both spouses, making the official’s value one-half, unless the gift is “peculiarly adaptable to the personal use and enjoyment by one spouse ....”

Regulation 18946.4 provides an exception for tickets to nonprofit and political fundraisers. The ticket value for nonprofit fundraising events other than for 501(c)(3)

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<sup>7</sup> “‘Fair Market Value’ means the estimated fair market value of goods, services, facilities or anything of value other than money.” (Section 82025.5.)

<sup>8</sup> The Commission first addressed the appropriate method for measuring the value of attending an event in *In re Gutierrez* (1977) 3 FPPC Ops. 44. The issue there involved the gift value to Judge Cruz Reynoso when he attended a reception in his honor. The Commission stated that “the value of the gift to Judge Reynoso is the value of the benefits he personally received by attending the event. ... [and that] the proper way to establish this value in this case is to divide the actual cost of sponsoring the event by the number of persons who attended.” (*supra*, at p. 45.) Regulation 18726.4, now 18946.2, was adopted in 1986 codifying the rule stated in that opinion, valuing testimonial dinners and events at which the official is honored, using a pro rata cost of the event plus any tangible gifts. (Regulation 18946.2 Rulemaking File; Staff Memorandum dated 10/24/85.)

organizations is the face value minus the amount indicated on the ticket as a donation to the organization. If the ticket has no stated price or no stated donation portion, the value is the fair market value of any food and beverage provided plus any tangible benefits received. Tickets to 501(c)(3) organization or political fundraising events have no value.

Regulation 18946.5 provides that prizes or rewards received in a bona fide competition not related to the recipient's status as an official or candidate are not gifts. The following table identifies the current regulations affected herein, the types of valuation for each gift identified, and the proposed regulatory amendments:

**TABLE 1**

<b>Regulation</b>	<b>Type of Gift</b>	<b>Valuation Method</b>	<b>Proposed Change</b>
<b>18946(a)</b>	General rule for valuation of all gifts not otherwise specified	Fair market value	None.
<b>18946(b)</b>	Unique or unusual gifts	Cost to the donor, if known or ascertainable. If not, reasonable approximation of fair market value.	None.
<b>18946(d)*</b>	Tickets and invitations	Face value; cost to donor	Adds definitions for "face value," "ticket/pass," and "invitation."
<b>18946.1(a)</b>	Tickets or passes to events	Face value if offered to public at face value.	Face value if purchased at face value, if purchased at price higher than face value — cost to the donor.
<b>18946.2</b>	Testimonial events honoring official	Pro rata share of the cost of the event.	None.
<b>18946.2(b)*</b>	Invitation-only events	Pro rata share of the cost to the donor.	Applies pro rata share rule from testimonial events to all invitation-only events.
<b>18946.2(c)*</b>	Invitation-only events	Pro rata share of the cost to the donor.	Defines method for determining pro rata share.
<b>18946.2(d)*</b>	Invitation-only events where official or candidate performs ceremonial function	Pro rata share of the cost of food and beverage provided.	Modifies pro rata share of the cost of the event rule when official/ceremonial function is performed. Limits value of gift to cost of food/beverage.
<b>18946.2(e)*</b>	Invitation-only events	Cost of food and beverage consumed.	Modifies pro rata share rule for "drop-in" attendance at event. Limits value to what is actually consumed.
<b>18946.2(f)* and 18640*</b>	Invitation-only events	Cost of food and beverage consumed.	"Drop-in" rule applied to lobbyist employer events.
<b>18946.4(b)</b>	501(c)(3) fundraising	No value.	Eliminates or limits "no value rule" for 501(c)(3)s.

\*Proposed language

The following proposed regulatory amendments address the issues raised above concerning the method and procedures used for valuation of certain types of gifts.

### III. PROPOSED REGULATORY ACTION

#### Discussion

**Issue No. 1: Value of Benefit Received in Attending an Event:** The City of San Diego hosted the National Football League's (NFL) Super Bowl in January 2003. On the Friday before the game, the NFL hosted a party known as the "Commissioner's Party." The party was a private, invitation-only event with approximately 4,000 invitees. The NFL sent admission passes to those invited. While the passes had no stated face value, a secondary market existed and some were sold on the secondary market for hundreds of dollars each. Of the approximately 4,000 invitees, 42 were city officials.

The San Diego City Attorney requested advice as to the value of the gift in attending this event, stating that the cost of the food and drink provided was approximately \$100. The question asked was whether or not a public official receives a gift "other than food, drink, and other tangible benefits, as a result of attending a party for which there is no admission charge, but for which there is a secondary market for the admission ticket with a resale value higher than the face value." Commission staff advised that the requestor need not take into consideration the secondary market value, but that the value of the gift in attending the event was the pro rata share of the total cost to the donor, taking into consideration payments for the rental of the facility, decorations, entertainment, and other tangible benefits in addition to payments for food and beverage. (*Foster* Advice Letter, No. A-03-014a, hereinafter *Foster I*.) The requestor submitted a second request based on the advice given, asserting that, under the circumstances, she believed that the cost should be the pro rata share of the food and beverage, rather than the cost of the event. The requestor based this assertion on previous advice letters that contained language indicating that when the event was not for the purpose of entertaining officials, the value of the event was the pro rata share of the cost of food and beverage only. (*Foster* Advice Letter No. I-03-128, hereinafter *Foster II*, relying primarily on *Litvack* A-93-105.)

The *Foster* Advice letters' analyses involve the following concerns:

1) First, because the request in *Foster* characterized the event as "an invitation-only event with no admission price" where those "who have been invited to this party ... received a *ticket* as an invitation, which has no face value on it," (emphasis added) the analyses began under regulation 18946.1, concerning tickets.

2) Second, because the "ticket" had no face value, the question was then analyzed pursuant to regulation 18946, finding that a "ticket with no face value" was the equivalent of a unique gift, and concluding that the value was the cost to the donor, determined by the official's pro rata share of the cost of the event.

3) Third, although using the same pro rata share of the cost of the event valuation rule as that used under regulation 18946.2, because the language contained in regulation 18946.2

only applies to events where candidates and officials are “honored at a testimonial dinner or similar event,” this regulation was not applied. Consequently, the analysis made certain assumptions: 1) that an invitation is a ticket under regulation 18946.1; 2) that because it has no face value it was to be treated the same as a unique gift under regulation 18946 and therefore, the fair market value rule does not apply; and 3) in determining the cost to the donor under regulation 18946, the pro rata share of the cost of the event rule applies.

These issues impact three of the current gift regulations — regulations 18946, 18946.1, and 18946.2 and raise the following questions:

1) For valuation purposes, should admission privileges to invitation-only events be treated the same as a “ticket” under regulation 18946.1 and, if so, how is the value to be determined when there is no face value and the “ticket” is not offered for sale to the general public?

2) If the invitation is to be treated as a “ticket with no face value,” is such a ticket, for valuation purposes, the same as a “unique gift” under regulation 18946, its value to be determined by the “cost to the donor?” If so, is the “pro rata share of the cost of the event” rule a proper method for determining the cost to the donor in these circumstances?

3) Should the testimonial event rule under regulation 18946.2 be extended to all invitation-only events, thereby applying the “pro rata share of the cost of the event” rule across-the-board to all events not open to the public and not just to officials or candidates honored at testimonials?

Staff believes the third option above is the preferable method for determining valuation. The proposed regulatory amendments to regulations 18946, 18946.1, and 18946.2 address this issue, pertaining to the value of the benefit received in attending an invitation-only event.

**Decision Point 1: Proposed Amendment to Regulation 18946 to add definition of “face value,” “ticket/pass,” and “invitation.”**

Regulation 18946 states:

(a) Scope of Section: Except as specified in California Code of Regulations, Title 2, Section 18946.1 through 18946.5, inclusive, gifts shall be valued at fair market value as of the date of the receipt or promise. ...

(b) General Rule for Valuation of Unique Gifts. Whenever the fair market value cannot readily be ascertained because the gift is unique or unusual, the value shall be the cost to the donor, if known or ascertainable. If the cost to the donor is unknown and unascertainable, the recipient shall make a reasonable approximation. In making such an approximation, the recipient shall take into account the



price of similar items. If similar items are not available as a guide, a good faith estimate shall be utilized.

Regulation 18946 provides the basic rule for reporting and valuation of gifts. Except for a few technical amendments, the only substantive amendment to the regulation is set forth under **Decision Point 1**, with the proposed addition of subdivision (d) defining “face value,” “ticket/pass,” and “invitation.”

Those proposed definitions are:

1. “Face Value” is the price indicated on the ticket, or if no price is indicated, the price at which the ticket or similar pass would otherwise be offered for sale to the general public by the operator of the venue or host of the event who offers the ticket for public sale.

2. “Ticket/Pass.” A “ticket” or “pass” is anything that provides an admission privilege to an event or function and for which similar tickets or passes are offered for sale to the public.

3. “Invitation.” An “invitation” is a request to attend an event or function by the sponsor of the event or function, that is not a ticket or pass as defined above, and where admission to the event is provided by such invitation only.

There are three means by which admission to an event may be provided: 1) events that are open to the public and which anyone may attend without paid admission or invitation (free events);<sup>9</sup> 2) events for which admission is provided at a price by purchasing a ticket; 3) events for which admission is provided by invitation-only.

**Pro:** This amendment would clarify differences between purchased ticketed events and events for which admission is provided by invitation, so that invitations are not characterized as tickets with no face value.

**Con:** The amendment may not be necessary if other amendments are adopted providing for valuation of gifts for invitation-only events. Also, it is difficult to define these terms for universal application.

**Staff Recommendation:** Adopt the definition of “face value” because it values a ticket with no indicated face value as equal to the selling price of equivalent tickets, even if the indicated face value indicated is “\$0.00” or a lesser amount than the true face value. Staff also recommends adopting the definitions of “ticket/pass” and “invitation-only” to clarify the differences between these types of events.

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<sup>9</sup> Free events are not gifts under the Act. Section 82028 provides that a gift is any payment that confers a personal benefit and includes a rebate or discount “*unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.*” (emphasis added.) This would include free events open to the public.

**Decision Point 2: Proposed Amendments to Regulation 18946.1(a) to address purchase price higher than face value.**

Regulation 18946.1(a) concerns valuation of tickets and passes. Aside from a few grammatical changes, the only substantive amendment proposed would add the underlined language to the existing regulation.

Proposed regulation 18946.1(a) would read:

“(a) A pass or ticket which provides one-time admission or access to facilities, goods, services, or other incidental tangible or intangible benefits (including a pass to motion picture theaters, amusement parks, parking facilities, country clubs, and similar places or events, and also including a ticket for theater, opera, sporting, or similar event, but not including travel or lodging) shall be valued at the face value of the pass or ticket, provided the face value is the price that was, or otherwise would have been, offered to the general public [and the ticket was purchased at no more than face value or provided to the recipient by the operator of the venue or host of the event for which the ticket provides admission. If the ticket is purchased by the donor at a price greater than its face value, the value shall be the cost to the donor.] A pass or ticket has no value unless it is ultimately used or transferred to another person.”

The proposed amendment addresses the value of tickets that are purchased at a price higher than the face value. Tickets to certain events, or premium seating to events, are often difficult to obtain at face value and may sell at prices hundreds of dollars over the face value of the ticket. For example, a ticket may have a face value of \$100, but be purchased for \$200. A donor purchasing tickets to certain events could actually be making a gift for which he or she paid well over the gift limit, but because of the face value rule, the gift would not fall within the limitations. This amendment modifies the rule for such an instance, making the value, as with other gifts, the cost to the donor.

**Pro:** Currently, the value of the gift received is limited to the face value of the ticket, no matter what the purchase price may be. Under the current rule, a donor could make a substantial gift to a public official without reflecting the true cost of the gift. This proposed change would limit the face value rule to situations where the ticket was purchased at face value or provided to the recipient by the operator or host of the event.

Under the proposed amendment, if the ticket is purchased at a price greater than its face value, the value of the ticket would be the cost to the donor. This method of valuation for tickets would more closely comport with the general practice of valuing gifts according to the fair market value rule or cost to the donor rule.

**Con:** Information would not be readily available and could be unreliable. It may be difficult to determine the cost to the donor. However, it would be no more difficult than ascertaining the cost in other situations as now required under regulation 18946. Additionally, under this proposed amendment, two officials attending the same event may have to report different gift values.

**Staff Recommendation:** Adopt the Proposed Amendments to Regulation 18946.1 (a).

**Decision Points 3-5: Proposed amendments to regulation 18946.2 to add subdivision (b) codifying *pro rata share of the cost of the event* rule to apply to invitation-only events; subdivision (c) defining *pro rata share*; and subdivision (d) providing exceptions for performing official or ceremonial functions.**

Current regulation 18946.2 states:

When an official or candidate is honored at a testimonial dinner or similar event, at which campaign fundraising for the official or candidate does not occur, the value received is the official's or candidate's *pro rata share* of the cost of the event, plus the value of any specific tangible gift that is presented to the official or candidate at the event.

The proposed amendments to regulation 18946.2 are the heart of the regulatory amendments contained herein. As stated above, regulation 18946.2 (formerly regulation 18726.4) was adopted to codify the Commission's opinion in *Gutierrez* and the "long standing advice" provided based thereon. However, the language in regulation 18946.2 currently limits the *pro rata share* of the cost of the event rule<sup>10</sup> to candidates and officials who are honored at testimonial events.

Under the proposed amendment, the current language would become subdivision (a). Subdivision (b) (**Decision Point 3**) would add language that would broaden the scope of the current *pro rata share* of the cost of the event rule to apply to all candidates and officials attending *any invitation-only event*, whether they are honored or not. Staff believes this is the preferred method of clarifying Commission advice relating to the value of the gift received in attending events and functions not related to honoring officials at testimonial dinners.

For example, an official or candidate who attends a reception, party, dinner, or similar type of event has received a "gift" from the benefit of attending the event. Under the *pro rata share* rule, that gift is valued at the cost of the event, including food, beverage, entertainment, decorations, rental of the facilities, etc., divided by the number of people who attend (or r.s.v.p.) the event.

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<sup>10</sup> The *pro rata share* of the cost of the event rule, as developed from the *Gutierrez* Opinion, *supra*, has included all costs associated with holding the event. Language is provided herein under Decision Point 4 defining the rule including what factors are to be included in determining the cost of the event.

The rule provided in this proposed amendment is identical to that provided in the current regulation 18946.2, but, as stated above, now extends to all invitation-only events:

**DECISION POINT 3:**[(b) Invitation-Only Events. Except as provided in subdivisions (d) through (f) when an official or candidate attends an invitation-only event such as a banquet, party, gala, celebration, or other similar function, other than a nonprofit or political fundraiser as set forth in regulation 18946.4, the value is the official's or candidate's pro rata share of the cost of the event, plus the value of any specific item that is presented to the official or candidate at the event.]

**Pro:** The proposed amendment clarifies and codifies existing Commission advice with respect to such events.

**Con:** There has been some opposition by members of the regulated community regarding whether to include anything beyond food and drink when the event is not held for the specific “purpose of entertaining or meeting with officials [or candidates].” It has been argued that the value of attending an event that would have taken place regardless of the event’s attendance by public officials should be limited to the material items actually received by those officials, rather than including such nonmaterial costs as entertainment and rent, since these costs would have been incurred regardless of the official’s attendance. (See *Foster* Advice Letters.) However, with some events, the entertainment is the primary reason for attending.

**Staff Recommendation:** Adopt the proposed addition of subdivision (b) to regulation 18946.2 establishing the appropriate method of determining the valuation of the gift received when attending an invitation-only event, other than a testimonial event where the official or candidate is honored.

**Decision Point 4** proposes to add subdivision (c), defining “pro rata share” as follows:

**DECISION POINT 4:**[(c) “Pro rata share of the cost of the event” includes the cost of all food and beverages, rent of the facilities, decorations, entertainment, and all other costs associated with holding the event, divided by the number of RSVP’s received or the number of attendees.]

This definition of “pro rata share” has been applied in numerous Commission advice letters specifying which factors are to be considered in determining pro rata share. (*Foster* Advice Letters, *supra*; *Eichman* Advice Letter, No. A-84-098; *Sutton* Advice Letter, No. I-91-347; *Litvack* Advice Letter, No. A-93-105; *Reed* Advice Letter, No. A-92-580).

The statutory definition of payment also supports inclusion of the listed factors in the value determination. A “payment” includes “a ... rendering of ... anything of value, whether tangible or intangible.” Accordingly, factors such as entertainment, whether

defined as tangible or intangible,<sup>11</sup> would fall within the definition. However, the definition of “gift” includes only payments that confer “a personal benefit on the recipient.” Because of this distinction, there has been some past discussion as to whether or not entertainment provides the type of personal benefit that can be quantified in terms of value in relation to the personal benefit received.<sup>12</sup>

**Pro:** The proposed amendment clarifies and codifies current advice and makes the rule more accessible. It also clarifies what factors need to be included in determining “pro rata share” and takes into account all factors associated with the production of the event.

**Con:** There has been some resistance to including anything beyond the food and drink provided in determining the pro rata share — especially regarding such factors as entertainment and decorations, which, it has been argued, may or may not provide any determinable personal benefit. On the other hand, in some instances, the entertainment is the primary factor for which the event was attended and it may be just as difficult to determine the personal benefit of food.

**Staff Recommendation:** Adopt the proposed addition of subdivision (c) to regulation 18946.2 establishing the factors to be included in determining “pro rata share of the cost of the event.” The determination of the appropriate factors to be considered is a decision for the Commission. While the definition of gift includes both “tangible” and “intangible” benefits, the Commission may determine that certain factors should not be included because they do not “confer a personal benefit on the recipient.”

**Decision Point 5** proposes to add subdivision (d), which addresses official or ceremonial functions. Currently, regulation 18944.1(d) provides an exception to the gift rule for *tickets* provided to officials for events where the official performs an official or ceremonial function. This exception states that tickets provided to such events are not considered gifts. The proposed language under Decision Point 5 applies the same official or ceremonial function principle, which now exists for *ticketed events*, to invitation-only events. Accordingly, under this application, the official *would not have to claim his or her pro rata share of the cost of the entire event*, but would need only report the value of any food and beverage provided to the official plus any specific item. The amendment provides:

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<sup>11</sup> Most Commission advice letters treat entertainment as a tangible item. Some do not — see footnote 12.

<sup>12</sup> While most of the advice letters addressing the factors determining “pro rata share” have included entertainment as one of those factors, one letter advised that “intangible benefits, such as ... entertainment are not a gift to the public official attending the event.” (*Bagatelos* Advice Letter, No. I-93-132.) This advice was provided based on a 1987 Commission meeting concerning amendments to the gift regulations involving charitable and political fundraisers (regulation 18726.8, now regulation 18946.4). According to the Commission minutes (January 13, 1987, at p. 4), Chairman Larson stated that since the value of “incidental entertainment” is often too difficult to ascertain, entertainment should not be included as part of the valuation. Thereafter, the language “plus the fair market value of any intangible benefits such as entertainment” was deleted, and the gift value included only “the fair market value of any food, beverage, or other tangible benefits provided to each attendee.” (See regulation 18946.4(a)(2).)

**DECISION POINT 5:** ~~(e)~~(d) Official or Ceremonial Functions. When an official performs an official or ceremonial function at an invitation-event as set forth in subdivision (b) above, in which the official is invited to participate by the event's sponsor or organizer by virtue of the official's position, and the official performs the act as an official function of the position held by that official, the value is the cost of any food or beverages provided to the official plus the value of any specific item that is presented to the official at the event.

For example, if a mayor of a city was to attend an invitation-only event to make a presentation honoring a member of the community for a special achievement or public service, the mayor would only receive the gift of any food or beverage he or she consumed plus any other specific item, and not his or her entire pro rata share of the cost of the event.

**Pro:** This language is proposed to provide consistency between ticketed and invitation-only events, so that an official is not required to report a greater gift value for attending an invitation-only event than for attending, a perhaps costlier, ticketed event, simply because admission to the event attended was not provided by ticket.

**Con:** The exception, as stated herein, is not as broad as the exception in regulation 18944.1, which includes spouse and members of the official's immediate family. This may raise certain issues with regard to disparity. On the other hand, invitation-only events are inherently different from ticketed events in that invitation-only events are not open to the general public. Therefore, the importance of performing an official function is potentially less significant and, therefore, the broader exception may not be as appropriate.

**Staff Recommendation:** Adopt the proposed addition of subdivision (d) to regulation 18946.2 for official or ceremonial functions.

**Issue Two: Valuation of "Drop-In" Only Attendance at an Event.**

The genesis of this issue relating to "drop-in" events is found in the *Sutton* Advice Letter, No. I-91-347 (hereinafter *Sutton I*). In September 1991, Attorney James Sutton wrote to Jeanne Pritchard, Division Chief of the FPPC Technical Assistance Division, seeking to confirm his understanding of information provided at an FPPC workshop with respect to the reporting of costs of receptions hosted by lobbyist employers and attended by state public officials. He stated that under the general rule "when a Lobbyist Employer hosts a legislative reception for its members, and invites California state public officials, it must report as an 'activity expense' the total cost of the event, including food, beverages, entertainment, and facilities."

The question he raised was "the value to public officials who attend the event, when the reception is a 'walk-in event' with an open bar and self-serving hors d'oeuvre table, for the purpose of limitations of gifts and the official's reporting obligations." According to his stated understanding of the information provided at the workshop, for "officials who stay an average amount of time, have a couple of drinks and partake from

the hors d'oeuvres trays, the gift value is the pro rata cost of the entire event.” But for “a public official who merely ‘stops by,’ perhaps has a Calistoga and quickly departs, you agreed that the pro rata share formula over values (sic) the gift,” and “that the cost of the food and beverage *actually consumed* is the ‘gift,’ if the host has a procedure to determine the actual consumption by the state public official.” (emphasis added.)

The response in *Sutton I* essentially confirmed his understanding in stating that: “when an official merely drops in at an event for a short period of time and does not stay and enjoy the entertainment or partake of an average amount of food and beverage, it would not appear to be necessary to allocate a portion of those expenses to the amount of the gift received by the official. Rather, it seems reasonable to attribute only the actual value of the drink or other item consumed by the official.”

The letter added that it is “crucial that detailed, accurate records are kept in order to comply with the Act’s disclosure requirements and limitations with regard to gifts to officials.” As a result of this advice, the Commission’s long-standing practice has been that a letter from the official to the host notifying him/her that the official did not partake of the food or entertainment provided is a sufficiently accurate record to comply with the disclosure requirements, and if provided by the official, the activity expense or gift reported may be adjusted accordingly with respect to that official. (See Lobbying Disclosure Information Manual 1998, p. 38.)<sup>13</sup>

This issue was raised in the regulation meetings in considering possible amendments to the gift regulations. It was also raised separately in the interested persons meeting, not in terms of the rule as applied to lobbyist employer events, but in general terms of providing such an exception for all events when attendance at the event was limited to a brief stay and limited consumption of food and beverages.

Therefore, staff has provided proposed regulatory amendments that offer the Commission the opportunity to determine whether this rule should be codified, and made available to all events, or be eliminated altogether. The proposed regulatory amendments impact regulation 18946.2 and add regulation 18640 and raise the following issue: Should the Commission codify the “drop-in” exception enunciated in *Sutton* and *Reed, supra* and make it an exception to the otherwise applicable valuation rules, or eliminate it altogether?

**Decision Point 6: Proposed amendments to regulation 18946.2 and addition of Regulation 18640 to codify the modification of the valuation rule for “drop-in” attendance at an event.**

**Decision Point 6** proposes to add subdivision (e) to regulation 18946.2, addressing “drop-in visits” and making the exception applicable to all events where a gift would otherwise be reportable as follows:

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<sup>13</sup> This rule was again applied the following year in the *Reed* Advice Letter, No. A-92-580, in a non-lobbyist employer context. While the rule had been consistently made available in the lobbyist employer context, primarily because of its inclusion in the manual, *Reed, supra*, has not been cited for that proposition in any subsequent letters, and it is questionable whether it would still be applied.

**DECISION POINT 6:**[(e) Drop-In Visit. Except as provided in subdivision (f) below, if an official attends an event referred to in subdivision (a) or (b) above and attends for {OPTION 1: alternative 1}[a brief period of time] {alternative 2}[30/45/60 minutes or less] and does not stay for any meal or entertainment provided at the event and receives only {OPTION 2: alternative 1}[minimal appetizers and drinks] {alternative 2}[ refreshments and non-cash nominal benefits], the pro-rata valuation method does not apply, and the value of the gift received is the cost of the {OPTION 2: alternative 1}[food and beverage] {alternative 2}[refreshments and non-cash nominal benefits] consumed by the official and guests accompanying the official, plus the value of any specific item that is presented to the official at the event. For purposes of this subdivision, “entertainment” means a primary show or performance intended for an audience, including a dance, and does not include music provided for background ambiance.]

The first option presents two separate alternatives to be considered in defining, in terms of duration, what constitutes a “drop-in visit.” The first alternative is flexible, providing that the official attends “for a brief period of time.” The second alternative is strict, and provides for a fixed time period of either 30, 45, or 60 minutes.

The second option addresses the limits of what can be consumed at a “drop-in visit” without being charged a full pro rata share. The first alternative limits consumption to “minimal appetizers and drinks,” while the second alternative provides “refreshments and non-cash nominal benefits.”

**Pro:** The amendment codifies the current rule, primarily available to officials attending lobbyist employer events and clarifies that the rule is applicable to all events. It may be a more equitable application of the gift rules, since it takes into account only the value of the gift actually received.

**Con:** The proposed amendment could be subject to abuse.

**Staff Recommendation:** Staff makes no recommendation as to the overall adoption of the addition of subdivision (e) to regulation 18946.2. This is essentially a policy decision to be made by the Commission. Staff raises the issue because of existing application to lobbyist employer events and possible confusion as to whether or not this rule is available to all events, so the Commission can either validate the rule and clarify its applicability to all events or invalidate the rule altogether.

With respect to the individual components of Decision Point 6, if adopted in principle, staff recommends the first alternative to Option 1. The entire reason for having an exception for “drop-in visits,” if there is one, is to allow officials who make a brief appearance, for appearance sake, and leave without receiving the entire benefit of the event, to be allowed to claim only the benefit of what they actually received rather than the entire benefit of what would have been provided, not to put a stopwatch on someone. Furthermore, the rationale for the drop-in rule is supported by the very definition of gift as the value of the personal benefit conferred on the recipient.



A restrictive time limit seems arbitrary, especially if it is too short. Under either option, the official would have to claim what he or she actually received. “Brief period” would mean the stay was limited to a relatively short period of socialization before the festivities (meals and entertainment) actually commenced. It would not require someone to break out of a conversation and dash for the door to avoid the full cost of the event, only minutes after having arrived.

**Decision Point 7** proposes to add subdivision (f)<sup>14</sup> to regulation 18946.2 and adopt regulation 18640, (see attached) which carry over the provisions of subdivision (e), dealing with drop-in visits, to the lobbyist employers’ reporting provisions end of the transaction, providing a separate regulation (regulation 18640) codifying the reporting obligations of lobbyist employers in accord with the advice provided in *Sutton I*, above.

In addition to the general gift reporting rules, lobbyist employers are required to separately file periodic reports listing all activity expenses including “any expense incurred or payment made ... which benefits “*in whole or in part* any elective state official, legislative official, agency official ....” (Sections 86111, 86112.) As part of this filing obligation, the lobbyist employer must additionally identify the amount of the expense attributed to each payee. (Regulation 18616(d).) Furthermore, pursuant to section 86112.5, any lobbyist employer required to file an activity expense report must provide the attending guest “a description of the goods or services provided.”

Regulation 18640, subdivision (a), sets forth the general rule that the value of the event is the pro rata share of the cost of the event. Subdivision (b) thereof contains the “drop-in” exception, allowing the lobbyist employer to report, as an activity expense, only the value of the amount of food and beverage consumed by the official, if the official provides the lobbyist employer written notification that he or she did not stay for the meal or entertainment and consumed minimal food and beverage.

**Pro:** The amendment codifies the current rule with respect to the reporting obligations of the lobbyist employer in filing its activity expense report, allowing it to modify the amount based upon written notification from the attending official, but not requiring it.

With respect to the value of the gift received by guests attending on a “drop-in” basis, the rule provides what may be a more equitable application of the gift rules, since it takes into account only the value of the gift actually received.

**Con:** The “drop-in” rule could be subject to abuse.

**Staff Recommendation:** Staff makes no recommendation as to the overall adoption of the addition of subdivision (f) to regulation 18946.2 and the adoption of the proposed regulation 18640. This is a policy decision to be made by the Commission. Staff raises the issue because of existing advice provided with respect to lobbyist employer events, including the lobbyist employer’s reporting obligations, so the

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<sup>14</sup> Subdivision (f) would become subdivision (e) if the Commission rejects Decision Point 6.

Commission can either validate the rule and clarify its overall effect applicable to events or invalidate the rule altogether.

**Issue Three: Charitable Fundraisers:** The Enforcement Division recently was asked to investigate a complaint involving distribution of Rose Bowl Parade and Rose Bowl Game tickets to Pasadena city officials by the Pasadena Tournament of Roses Association (“Association”). The Association is a 501 (c)(3) charitable organization. The Rose Parade and Rose Bowl Game are the primary fundraising events for the Association. The investigation found that the Association makes 2,100 grandstand seating tickets to the parade available to the city at no cost. The city then distributes the tickets to its employees. The investigation found that, of the 2,100 tickets distributed, the mayor would receive 150 to 230 tickets, city council members 120 tickets apiece, and the city manager would receive between 30 to 100 tickets. Tickets for grandstand seating to the coming year’s Rose Parade sell for between \$40-\$85 per ticket.

Additionally, the Association made available to the city 1,200 Rose Bowl game tickets for purchase at face value and also offered to provide the mayor and each city council member *four tickets at no cost to them*. Last year’s Rose Bowl tickets sold at \$125 apiece. The Rose Bowl has been a consistent sell out for over fifty years. Tickets to the Rose Bowl game are very difficult to obtain at face value.<sup>15</sup> Most are provided to the represented schools and the two conferences. A limited number are reserved for residents of Pasadena. The remaining tickets are put on sale to the general public.

Pursuant to the language in current regulation 18946.4(b), the case was closed because, as a fundraising event for a 501(c)(3) organization, the tickets have no value. The proposed regulatory amendments to regulation 18946.4 addressed herein offer various alternatives to the rules affecting valuation of gifts in attending a fundraising event for nonprofit organizations.

Regulation 18946.4 (formerly 18726.8) was originally adopted in 1987 along with several other regulations dealing with the definitions of “gift.” The regulations represented the codification of existing Commission advice and opinions on the subject of gifts, and it was intended that this information all be consolidated in one location and “provide the public and public officials with clear guidelines on how to treat gifts for the purposes of disclosure and disqualification.” (Staff memorandum dated December 30, 1986.) The original language is substantially the same as it now exists, except it did not include the exception for 501(c)(3) organizations now set forth under regulation 18946.4(b).

In 1993, regulation 18726.8 was renumbered to its current 18946.4. Additionally, in response to a letter from the Governor’s office dated August 17, 1991, requesting that the regulation be amended to provide that tickets to charitable events have no value, the Commission adopted subdivision (b), limiting the no value exception to 501(c)(3) charitable organizations. The exceptions were limited to 501(c)(3) organizations after

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<sup>15</sup> They are easier to get if money is no object. One website is currently offering tickets to the 2005 Rose Bowl. They range in price from \$375 for the end zone to \$800 for the 30-50 yard line.

staff recommended against including all charitable organizations because it was “over broad” in that it would include labor organizations, chambers of commerce, credit unions, and a “long list of other organizations” which would be exempt from disclosure, many of whom “seek to influence public officials, and gift tickets that they provide to officials should not be exempt from disclosure.” (See Staff memorandum dated January 27, 1991 (sic).)

While the proposed amendments addressing this issue developed as a result of the Rose Bowl “no value” exception for 501(c)(3) organizations, they have relevance beyond just that specific event. Other 501(c)(3) organizations stage fundraising events that involve the sale of tickets that potentially could cost hundreds of dollars. The options proposed include: (1) eliminating the “no value” rule as applied to 501(c)(3) organizations, and (2) modifying the “no value” rule as applied to 501(c)(3) organizations. The proposed regulatory amendments impact regulation 18946.4 (b) and address the issue of whether the “no value” rule for tickets to a fundraising event for 501(c)(3) organizations should be modified or eliminated.

The proposed amendments to regulation 18946.4 include minor amendments to subdivision (a) relating to fundraising events for nonprofit organizations other than 501(c)(3) organizations. One of those amendments is to change the valuation method under subdivision (a)(2) from the “fair market value” of any food and beverages to the “pro rata share” of the cost of any food and beverages. This amendment is suggested because it conforms to the valuation method for events described under the proposed changes to regulation 18946.2 and because, in practice, that is how the valuation has been determined. The remaining proposed amendments to regulation 18946.4 are addressed under Decision Point 8.

#### **Decision Point 8: Proposed Amendment to Regulation 18946.4**

Regulation 18946.4(b) states that a ticket or other admission privilege to a fundraising event for an organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code has no value.

**Decision Point 8** offers three options relating to the no value exception for 501(c)(3) organizations, providing as follows:

**Decision Point 8, Option 1** eliminates the no value rule for 501(c)(3) fundraising events altogether. If eliminated, 501(c)(3) organizations would fall under the general rule for nonprofit organizations as set forth under regulation 18946.4(a).

**Decision Point 8, Option 2** limits the no value rule to two tickets per recipient. If more than two tickets are received, the value for the additional tickets is the face value of the ticket, provided that the face value is the price that was, or otherwise would have been, offered to the general public and the ticket was purchased at face value or provided to the recipient by the organization. If the ticket is purchased by the donor at a price greater than its face value or no face value is indicated on the ticket or other admission

privileges, the value shall be the cost to the donor of the ticket or other admission privileges.

**Decision Point 8, Option 3** would leave the no value rule intact for “noncommercially marketed” fundraising events. However, it would provide the following limitations for “commercially marketed” events for organizations exempt from taxation under 501(c)(3) of the Internal Revenue Code. [If the event is a commercially marketed event, the value of the ticket or other admission privilege shall be the face value of the ticket. If the ticket has no stated face value, the value of the ticket or other admission privilege shall be the cost to the donor. For purposes of this section, “commercially marketed event” means an event that is broadcast {Alternative 1:}[to a national television audience] {Alternative 2:} [in a major television market] {Alternative 3:}[on television] {Alternative 4:} [on television or radio].

The third option aims at eliminating the exception for big ticket events such as the Rose Bowl, which gave rise to this issue in the first place. Under this option, most 501(c)(3) charitable fundraising events would be unaffected by the change. However, for events such as the Rose Parade, Rose Bowl game, Pebble Beach Pro-AM Golf Tournament, Academy Awards, and other big ticket events, the tickets would be valued at the face value of the ticket, if purchased at face value or provided by the sponsoring organization. If not, the value would be the amount paid by the donor of the ticket.

The third option under Decision Point 8 offers four alternatives to determine what events would fall into the ‘big ticket’ or, as stated under the proposed changes, “commercially marketed” category. The first alternative is directed at only fundraising events drawing national television attention, such as the three specifically mentioned above. The second and third alternatives use a little bit broader net, and take in any event broadcast in a major television market, or on television, respectively. This could include events such as the “Pig Bowl.” Finally, the last alternative applies to any event that is aimed at an audience beyond those in attendance.

**Pro:** The proposed alternatives in Decision Point 8 would eliminate the potential, under the current regulation, for using the 501(c)(3) no value rule to avoid the Act’s regulation of gifts to public officials, both in the making/receipt of and reporting of such gifts. Currently, a donor, including lobbyists, could pass along gifts valued in the hundreds of dollars without detection under this exception. Furthermore, under the current Rose Parade and Rose Bowl ticket distribution plan, certain public officials are able to obtain, without any reporting obligations, highly valued tickets which they then may distribute in any manner they wish.

**Con:** Depending on which option is adopted, the proposed amendments could restrict the operations of 501(c)(3) organizations with substantially smaller fundraising events.

**Staff Recommendation:** Staff recommends adopting either Option 2 or Option 3-alternative 1, under Decision Point 8 regarding the proposed changes to regulation 18946.4. Option 2 is straightforward and simple and would at least require officials receiving gifts of more than two tickets to big events to report the receipt of such gifts.

The downside is that it may affect the operations of smaller 501(c)(3) organizations and would still allow the passing of tickets potentially valued at hundreds of dollars over the gift limit without detection. Option 3-Alternative 1 affects only the type of charitable fundraising events that raised the issue of concern at which this proposal is directed.

Attachments:

Regulation 18946 — amendments

Regulation 18946.1 — amendments

Regulation 18946.2 — amendments

Regulation 18640 — adopt

Regulation 18946.4 — amendments